MORGAN STANLEY EMERGING MARKET INC A

v.

METROPLEX BHD;
OCBC BANK (M) BHD (APPLICANT)

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HIGH COURT MALAYA, KUALA LUMPUR
TENGKU MAIMUN J
[COMPANIES WINDING UP NO: D4-28-258-2005]
11 JUNE 2010

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COMPANY LAW: *Winding up - Petition - Winding up petition filed by petitioner - Intervener subsequently filed separate winding up petition and applied for leave to intervene - Whether resulting in multiplicity of proceedings - Whether multiple winding up proceedings allowed by law - Whether intervener stopped from applying for leave - Companies Act 1965, ss. 218, 226(3) - Companies (Winding-Up) Rules 1972, rr. 28, 33*

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On 4 March 2002, the applicant (intervener) in this case had obtained an O. 14 judgment against the respondent for some RM42 million. Subsequent thereto, a restraining order was obtained and renewed by the respondent pursuant to s. 176 of the Companies Act 1965. On 30 November 2004, the respondent's application for a fifth extension of the restraining order was however dismissed, and following that, on 13 April 2005, a winding up petition was filed by the petitioner herein. The respondent opposed the petition. Be that as it may, in June 2005 the applicant filed a Notice of Intention to Support the Petition and in December 2006 Provisional Liquidators were appointed over the respondent. On 27 April 2010, following the dismissal of a second restraining order obtained in 2009 by the respondent, the applicant issued 'a section 218' notice to the respondent, and further, applied for leave to intervene under s. 226(3) of the Companies Act 1965 and to institute proceedings to enforce the O. 14 judgment aforesaid. It was the applicant's case that the application for leave ought to be allowed as: (i) there was no dispute over the respondent's debt to the applicant; (ii) the respondent's proposed schemes of arrangement had been rejected by the creditors; (iii) the petition was yet to be disposed although more than five years had since elapsed; and (iv) multiple winding up proceedings is allowed by the law. The respondent *inter alia* contended that having filed the Notice of Intention to Support the Petition, the applicant is now estopped from applying for leave.

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Held (dismissing application to intervene):

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(1) As provided for under r. 28 of the Companies (Winding-Up) Rules 1972, the Notice of Intention to Appear (to support or oppose the petition) is to enable the applicant to appear on the hearing of the petition. It does not amount to an estoppel such that the applicant is now restrained from applying for leave. (para 9)

(2) As for the contention on multiplicity of proceedings, the answer is found in the case of *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals*. Maril-Rionebel remains the authority in so far as it establishes the principle that more than one winding up petition may be presented against a company. (paras 10 & 11)

(3) As for the point on s. 226(3) of the Companies Act 1965 (leave of court), based on the authorities of *Chatib Kari v. Mosbert Bhd (in liquidation) and Mosbert Bhd (in liquidation) v. Stella D'Cruz*, where the circumstances in which leave may be granted was considered, it is incumbent on the applicant to show that their claim cannot be adequately dealt with in the winding up or the remedy the applicant seeks cannot be given in the winding up proceedings. This, the applicant has not done. (para 14)

(4) There can be no doubt that there has been some delay in the disposal of the petition herein as it has been five years since the petition was filed and it is still pending. The applicant, however, has not provided any authority to support the proposition that delay is a ground for granting leave. The applicant thus has failed to meet the required test. (para 16)

Case(s) referred to:

Chatib Kari v. Mosbert Bhd [1984] 2 CLJ 30; [1984] 1 CLJ (Rep) 501 HC ***(refd)***

Deutz MWM Far East Pte Ltd v. The Owners Of & Other Persons Interested In The Ship Or Vessel "Hull No. 308"; Standard Chartered Bank (Interveners) [1991] 3 CLJ 2984; [1991] 4 CLJ (Rep) 495 CA ***(refd)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***

Mosbert Berhad (in liquidation) v. Stella D' Cruz [1985] 1 LNS 47 FC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 176, 226(3)
Companies (Winding-up) Rules 1972, rr. 28, 33

Other source(s) referred to:

BH McPherson, *The Law of Company Liquidation (1980)*, 2nd edn, p 71

For the petitioner - M/s Shearn Delamore
For the respondent - Wong Rhen Yen (Goik Kenwayne with him); M/s Dennis Nik & Wong
For the applicant - Yoong Sin Min (Tan Gian Chung & Chong Fong Yee with her); M/s Shook Lin & Bok

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Tengku Maimun J:

[1] The applicant had obtained an O. 14 judgment against the respondent on 4 March 2002 for RM42,610,361.12 with interest and costs. On 22 October 2002 the respondent obtained the 1st restraining order pursuant to s. 176 of the Companies Act. The 1st restraining order was extended four times pursuant to orders dated 17 April 2003, 19 August 2003, 15 July 2004 until 21 October 2004. The respondent's application for 5th extension of the 1st restraining order was dismissed with costs on 30 November 2004.

[2] The winding-up petition herein was filed by the petitioner on 13 April 2005. The petition was opposed by the respondent on the issue of the petitioner's *locus standi*. The applicant filed a Notice of Intention to Support the Petition on 7 June 2005. On 22 December 2006 the Provisional Liquidators were appointed over the respondent. The appointment was limited to working with the management of the respondent:

1.1. to formulate and present a composite group wide scheme of arrangement pursuant to s. 176 of the Companies Act 1965;

1.2. to endeavour to preserve the listing status of the respondent and to facilitate continued trading in the shares of the respondent.

[3] On 15 May 2007 the respondent was de-listed from the Official List of Bursa Securities by Bursa Malaysia and on 3 April 2009 the 2nd restraining order which was obtained by the respondent on 22 January 2009, was set aside. The applicant issued a s. 218 notice to the respondent on 27 April 2010,

[4] *Vide* a notice of motion (encl. 308) the applicant is seeking for leave under s. 226(3) of the Companies Act 1965. The application is worded as follows:

(a) That the applicant be granted leave to intervene in these proceedings;

(b) That the applicant be given leave to institute proceedings for the enforcement of the judgment dated 4 March 2002 obtained by the applicant against the respondent including the presentation of a winding-up petition against the respondent; and

(c) Such further and/or other relief as this Honourable Court deems just and fit.

[5] Enclosure 308 is premised on the ground, *inter alia*, that the respondent's proposed schemes of arrangement have been rejected by its creditors, that the respondent was de-listed from Bursa Malaysia Securities Bhd and the petition herein has yet to be adjudicated although more than five years have elapsed.

[6] Learned counsel for the applicant submitted, *inter alia*, that this court had on 20 October 2008 and again on 18 November 2009 allowed the application by Affin Bank Bhd, a creditor of the respondent, leave to commence separate winding-up proceedings against the respondent (Affin Bank has since withdrawn its petition) thus the applicant should also be permitted to file its own winding-up action; that there is no dispute over the respondent's debt to the applicant; that the respondent is unable to pay its debts; that the petition herein is still not disposed of after five years and that multiple winding-up proceedings is permitted.

[7] For the respondent, learned counsel submitted that prayer (1) of the application is misconceived and bad in law as there is no such provision found in the winding-up rules, that the notice of motion is a wrong mode as the proper procedure would be to file an originating summons and that the application for leave to institute execution or enforcement proceedings which includes presenting a winding-up petition is misconceived in law and/or in fact as it is trite law that winding-up is not enforcement or execution of a judgment.

[8] The above grounds put forth by the respondent, in my view are purely technical. The essence would be learned counsel's submission that the applicant has not shown that they have a proprietary claim and neither have they shown the balance of convenience in which the applicant's claim is not one which can be easily dealt with in the winding-up petition herein; that the applicant has the inherent right and local avenue to appear at the hearing of the petition and that the delay in prosecution of this petition is not a ground to seek leave to commence separate proceedings; that the applicant, an unsecured creditor should not be given the advantage over the others by presenting a 2nd winding-up petition and any separate petition presented by the applicant will contribute to duplicity of proceedings. Further, it was the submission of learned counsel that in the event the court held that the petitioner herein is not entitled to present the petition, the applicant is entitled in law to seek leave to be substituted as petitioner under r. 33 of Companies (Winding-up) Rules 1972.

[9] I will deal with the points on estoppel and multiplicity of proceedings first. It was the contention of the respondent that having filed the Notice of Intention to Support the Petition, the applicant is now estopped from applying for leave. As provided for under r. 28 of the

Companies (Winding-up) Rules 1972, the notice of Intention to Appear (to support or oppose the petition) is to enable the applicant to appear on the hearing of the petition. It does not, in my view, amount to an estoppel such that the applicant is now restrained from applying for leave.

[10] On the respondent's contention that there will be multiplicity of proceedings if leave is granted, the answer is found in the case of *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248 where Gopal Sri Ram JCA (as he then was) said at p. 259:

> ... more than one winding-up petition may be presented against a company. Of course, the provisions of r. 33 is available to a petitioning creditor. And if he does not take advantage of that rule to have himself substituted for a lethargic petitioner, he may find himself out of pocket for his costs. But on no account is his petition bad in law. Nor is it an abuse of the court's process.

[11] Learned counsel for the respondent submitted that *Maril-Rionebel* is distinguishable in that there was no Provisional Liquidator appointed and no Notice of Intention to Support the petition was filed therein. Notwithstanding the different facts, I do think *Maril-Rionebel* remains the authority insofar as it establishes the principle that more than one winding-up petition may be presented against a company. But *Maril-Rionebel* is not a case on point for s. 226(3) of the Companies Act which provides:

> When a winding-up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except:
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> (a) by leave of the court; and
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> (b) in accordance with such terms as the court imposes.

[12] The authority for s. 226(3) is found in *Chatib Kari v. Mosbert Bhd* [1984] 2 CLJ 30; [1984] 1 CLJ (Rep) 501 where the circumstances in which leave may be granted was considered. There, at p. 71, the learned judge referred to a passage in *The Law of Company Liquidation* by BH McPherson (1980) 2nd edn. which states:

> **Leave to proceed**
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> Cases in which the courts have granted leave to commence or continued proceedings against a company in liquidation can be fairly readily resolved into two principal categories. In one, the determining fact has been the nature of the plaintiff's claim; in the other, the balance of convenience and the demands of justice.

A (a) Proprietary claim. It has been said that where what the plaintiff is claiming from the company is in reality no more than his own property, leave to proceed will be granted as a matter of course ...

(b) Balance of convenience. In *Century Mercantile Co, v. Auckland*
B *Provincial Fruit growers Society*, the court adopted from 'Lindley on Companies' the statement that in determining whether leave to proceed should be granted:

The only material question to be considered is whether there are any circumstances which render it necessary that the action should be
C continued, or whether the claim of the plaintiff is not one which can be as easily dealt with in the winding-up as in any other way.

According to this principle, the question is fundamentally one of expedience and convenience. It follows that proceedings brought primarily against third persons, to which the company is a party only
D for formal reasons, are usually allowed to proceed, as also are claims which by their nature are likely to be more difficult or more expensive to settle in winding-up rather than by action at law. Conversely, leave is almost invariably refused where the claim is in respect of what is no more than a simple contract debt which can be submitted to proof in the ordinary way ...

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[13] In *Mosbert Berhad (in liquidation) v. Stella D' Cruz* [1985] 1 LNS 47 Sean SCJ said at p. 447:

... it cannot be disputed that the primary object of winding-up is the collection and distribution of assets of the company *pari passu* amongst
F unsecured creditors after payment of preferential debts. And the purpose of the statutory provision is to ensure that all claims against the company in liquidation which can be determined by the cheap and summary procedure available in a winding-up are not made the subject of expensive litigation. The provision is designed to prevent unnecessary multiplicity of suit which may result in dissipating the
G assets of the company.

The learned Supreme Court judge further said:

In *re Cuthbert Lead Smelting Co Ltd* it was held that if the applicant could obtain all the relief in the winding-up leave would be refused. In
H short, the court will always give an applicant leave if his claim cannot be dealt with adequately in the winding-up or if the remedy he seeks cannot be given to him in a winding-up proceedings.

(See also *Deutz MWM Far East Pte Ltd v. The Owners Of & Other Persons Interested In The Ship Or Vessel "Hull No. 308"; Standard Chartered Bank*
I *(Interveners)* [1991] 3 CLJ 2984; [1991] 4 CLJ (Rep) 495)

[14] Based on the above, I think it is incumbent on the applicant to show that their claim cannot be adequately dealt with in the winding-up or the remedy the applicant seeks cannot be given in the winding-up proceedings. This, the applicant has not done, although learned counsel for the applicant did submit in her reply to the respondent's submission that the position of the applicant falls under the category 'balance of convenience'.

[15] The fact that Affin Bank Bhd has been granted leave by this court does not necessarily mean that the test propounded in *Mosbert* need not be fulfilled by the applicant. It must also be noted that Affin Bank did not file a notice of intention to appear under r. 28. Hence they would have no locus to appear on the hearing of the petition herein, necessitating them to seek leave.

[16] The applicant contended that there has been prolonged delay on the winding-up petition 'with no end in sight' and that although recourse under r. 33 is available to the applicant, it will only be at the end of the petition. Learned counsel for the respondent informed the court that the petition is fixed for final disposal on 11 to 15 October 2010. There can be no doubt that there has been some delay in the disposal of the petition herein as it has been five years since the petition was filed and it is still pending. The applicant however, has not provided any authority to support the proposition that delay is a ground for granting leave. The applicant, in my view has not met the required test. Enclosure 308 is therefore dismissed with no order as to costs.